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Via Regular Mail

February 7, 2014

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Subject: 20802 Pacific Coast Highway, Malibu (Violation File No. V-4-02-098; Lent)

Dear Mr. Aftergood:

Thank you for taking the time to speak with me on December 19, 2013. During this call we discussed a number of issues that you have raised before with Commission staff regarding the ongoing Coastal Act violations at 20802 Pacific Coast Highway in Malibu. We are more than willing to respond to these issues again and look forward to resolving these violations amicably. This letter, therefore, will serve to confirm the content of our phone conversation, as well as to summarize and respond to the issues you have raised. As you know, the Commission has been attempting to resolve the ongoing violations at this property regarding unpermitted development and lack of compliance with permit conditions for a number of years.

Summary of Phone Call of December 19, 2013

In our phone call you agreed that there is an existing five-foot wide public access easement along the eastern side of the Lent property. However, you asserted again that the site conditions at the residence make a public accessway within the easement area a practical impossibility. You also asserted that the unpermitted doorway and staircase within the vertical easement area were necessary to provide the residence with a second form of egress, which, you allege, was required by LA County Building Code and that removal of the exit and stairway would result in unsafe living conditions. We also discussed issues with the 2010 architectural plans prepared by the firm Bionic for the Coastal Conservancy, and I assured you that any negotiated Consent Order could include language allowing the Lents input into the design of the eventual vertical public accessway. We also discussed the original 1980 architectural plans submitted to L.A. County and to the Commission, which you argue show an exit doorway on the eastern property side. Finally, we discussed your suggestion that the Lents would settle the violation by funding the construction of a public accessway at another easement nearby.

Summary of Issues Raised

Based on our conversation, notes from your conversations with previous enforcement staff and your letter to the Commission on August 2, 2011, a number of issues remain under discussion.

Whether the Unpermitted Development was Included in Original Permits

You have provided copies of the original plans submitted in 1980 to the L.A. County Division of Building and Safety that depict an exit door and stairway on the eastern property side that may match the stairs' current location. You also submitted a copy of plans submitted to the Commission on June 4, 1981 for the second permit amendment application, which you argue show in the ground floor plan an exit doorway on the eastern property side. Although no stairway appears on the plans, in conversation, and in your letter of August 2, 2011, you assert that drawing a doorway in plans was a typical means to indicate an external staircase as well.

There are a number of factors undermining the proposition that either of these plans indicates the staircase and other unpermitted development should remain in the dedicated vertical access easement. First, while the plans submitted to L.A. County on August 18, 1980 may show an exit door and external staircase, these plans were never submitted to the Coastal Commission as part of any permit application. As you know, a Coastal Development Permit (CDP) is required for all development in the coastal zone and the Coastal Act requirements for approval are separate and distinct from other permits which may be required by other agencies under other authorities. Section 30600(a) of the Coastal Act specifically provides that "in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person . . . wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit." Therefore, even if approved by another agency under their regulations, the stairs still constitute development under the Coastal Act and require a separate CDP from the Commission. That LA County may have approved plans submitted to them as part of a building permit application is completely irrelevant to the issue of a CDP.

Second, I have carefully reviewed all subject property plans submitted to the Commission including: 1) the original application plans for permit 421-78 (application number P-78-3591) dated 09/22/1977 but revised through 03/17/1978 ("1978 Plans"); 2) the plans for the first CDP amendment, approved on February 20, 1980, dated October 16, 1979, with multiple later dated revisions ("1980 Amendment Plans"); and 3) plans for the second amendment, approved on June 16, 1981, dated 12/1979 with various revisions through 08/21/1980 ("1981 Amendment plans"). Except for the final set of 1981 Amendment plans, which are questionable on the issue themselves, none of these plans show any indication of an exit door or stairway on the eastern side of the property.

It is important to note that the only plans of importance here are the 1978 plans. These are the plans that were the basis of the Commission's CDP approval. These plans clearly indicate an unbuilt area over the new sewage pipe in the easement and clearly—in plan, section, and elevation—show a lack of a door or staircase on the eastern property line. This was consistent

with the fact that the permit included a condition requiring recordation of an irrevocable offer to dedicate a vertical public access easement in that area. Once the permit was accepted with that condition and the offer for the vertical easement recorded, it would have required a specific amendment to modify or delete the condition and/or to authorize revocation of the offer.

The 1980 and 1981 Amendment plans, however, were specifically limited to stringline adjustment issues on the ocean front side of the residence. Both specifically included provisions stating that no other aspects of the original permit were being amended. It is worth recalling that the 1981 Amendment Plans you cite concerned only an "after the fact" permit for the residence's accidental encroachment on its western corner of the stringline limits of the original CDP by 18 inches. Indeed the 1981 Amendment issued by the Commission itself specifically states, "this modification shall only allow an 18" encroachment at the western corner of the house." Otherwise, the Amendment attached the original permit and stated that: "All conditions of the original permit not expressly altered by this amendment shall remain in effect." The 1981 Amendment also stated all construction, except that modified by the amendment (the 18 inch encroachment), must follow the proposal as set for in the permit application, and that any "further deviations from the approved plans must be reviewed by the Commission . . . ." The 1981 Amendment plans, therefore, only pertained to the 18 inch encroachment and could not in any way affect any other aspect of the original CDP including the unencumbered vertical easement requirement. Any development not included in the original permit application besides the 18 inch encroachment would still require a CDP.

Third, even the 1981 Amendment plans do not support your allegation that they include the exit door and stairway. You state that the inclusion of a door drawn into the northeast corner of the ground level floor plan in the last set of the 1981 Amendment plans indicates by implication an exit door and stairway. Yet, every other element of these plans disputes this inference. First, the larger site plan of the residence does not show any staircase on the east side and clearly delineates an unencumbered five foot wide "public access easement" along that eastern property line. Second, an external egress stairway is clearly drawn on the western property line in the same floor plan. Arguing that a possible drawing of a door somehow implies a full external staircase is unsupported by the very plans under discussion, especially when other external staircases are clearly drawn in the plans and the unpermitted staircase is not. Finally, the full set of plans also included elevation drawings, both east and west. The west elevation clearly shows an external staircase to match the one drawn in plan. Yet the east elevation does not show any external door or staircase, which it clearly would since it shows other external elements such as windows. Taken together, it is simply illogical to infer an egress and staircase was submitted as part of the 1981 permit amendment application when in all other respects the plans clearly show an unencumbered easement area on the eastern property side.

As a final note, even if any of these plans had been submitted to the Commission as part of an amendment application with such a staircase, the Commission would have been required to reject such an application. 14 CCR Section 13166(a) specifies: "The Executive Director shall reject an application for an amendment to an approved permit if he or she determines that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit . . . ." Because the original permit required the dedication of the accessway for public use,

development that precludes the use of that vertical easement to the public would necessarily lessen the intended effect of that CDP, and thus, would have had to be rejected.

In sum: none of the plans submitted to the Commission show external stairs in the vertical easement; the plans that were the specific basis for CDP approval in 1978 clearly do not show any door or staircase; the 1981 second amendment was specifically limited to a de minimus stringline encroachment, did not include an application for anything else and therefore could not have had any effect on previous CDP conditions including the vertical easement; those plans and the amendment that the Commission issued were specifically limited in the effect of the amendment to preclude additional changes without a new application; if any such change were proposed, the amendment would have had to be rejected; and finally, any approval of another agency under different legal provisions is irrelevant to the issue of a CDP.

Whether the Unpermitted Development is Required to Meet Building Codes

In our conversation on December 19th, in your conversations with other Commission staff, and in your letter of August 2, 2011, you asserted that the development within the public easement is necessary for the Lent residence to meet applicable local building code requirements for egress. You have also submitted reports by architects Robbin Hayne and David Lawrence Gray, which conclude that under the 2010 California Building Code, the Lent residence requires two egresses. You have also previously argued that the egress was required by the original 1980 building code. Also throughout, you have declared that existing staircase on the eastern property side is the only feasible second egress for the Lent residence. After review, we have concluded that none of these assertions are correct.

Existing building codes do not appear to require a second egress in this circumstance. I discussed the issue with Malibu building inspectors who stated that typical single family residential homes only require a single egress via a door to a public way.

I also reviewed the egress requirements for R3 single family residences in the California Building Code that are citied by your architects. These are specified in Chapter 10, with section 1015.1 and table 1015.1 requiring two exits when the occupant load exceeds 10. Occupant load is determined under section 1004.1 and table 1004.1.1 by dividing the floor area by 200. Both architect statements you provided were prepared based on 2600 square feet of habitable floor space, which would give an occupancy load of 13 and therefore a requirement of two egresses. Yet the original approved 1978 plans cite a floor area of 1877 square feet. Current parcel information with Los Angeles County gives a current square footage of 1896 square feet. Either would give an occupant load under 10 and not require a second egress.

Instead, the finding of 2600 square feet for the house is apparently based on the inclusion of all external decks and garage. This does not match the habitable square footage that the Building Code requires be used or that is cited on all the plans submitted to the Commission and evident in current property records. Notably the 2010 Building Code chapter on egress defines floor area in section 1002.1 as: "**FLOOR AREA, GROSS.** The floor area within the inside perimeter of the *exterior walls* of the building under consideration, exclusive of vent shafts and courts . . . ."

Section 1004.8 of the Occupant load definition specifically excludes "outdoor areas associated with Group R-3." Additionally, the 2002 Malibu LCP defines: "FLOOR AREA, GROSS - the sum of the gross horizontal areas of the several floors of a building measured from the interior face of exterior walls." Moreover, I and previous Commission staff discussed this very issue with City of Malibu staff, and confirmed that this method of measuring floor area is correct and that requirements for a second egress do not apply for a residence of this size. Research by Commission staff also confirmed that the egress was not required by the original building code at the time of construction.

Additionally, the argument that there are no other possible points for a second exit violates basic notions of common sense. Although any new exit development will require a new CDP review, a cursory review of other buildings in the area indicates all manners of exits that could potentially be adopted, including onto the public access stairway itself. Indeed, the 1980 Amendment plans for the subject residence were approved with an exit staircase on the western edge of the property, just with the modification that those stairs do not extend past the property bulkhead. Instead, the stairway was apparently erected along with the original structure and placed in the eastern area specifically identified in all submitted permit plans as reserved for a vertical public access easement. Thus, the stairway was constructed with full notice that it was in conflict with the express requirements of the permit.

Whether the Construction of a Public Accessway is Feasible

You have also repeatedly raised the argument that a public access stairway is infeasible in the location and assert that there are "seemingly insurmountable problems." You also submitted statements by staff retained by your client, engineer David Weiss and architect David Gray, that conclude the public access stairway is unbuildable.

Many public access stairs have been built in many places along the California coast and they have often had to address difficult design issues with changing beach conditions, irregular wave impacts, and coastal bluff retreat, all while providing safe public access. In each case it is anticipated that such public access points will require regular maintenance and updates, but these are managed by the easement holder. Thus, the details on how to construct the public accessway are a concern of the public access easement holder. The simple fact is that there is a public easement in this location; the holder of that easement, the Coastal Conservancy, believes that a public accessway can be built in this location and desires to do so. That it may require some finesse to design a solution in this location does not excuse the ongoing violation of the Coastal Act and the express permit condition on which a permit for this residence was originally granted.

It is worth stating again that under negotiated Consent Orders, the easement holder could work collaboratively with the Lents. The orders could address timing of the removal and coordinate it with development of the accessway plan. Moreover, negotiated orders would give the Lents an opportunity to participate in the design, timing, and scope of the public access easement.

Finally, you have also asserted that because of the drainage pipe there is no room for the stairway to connect to the beach without crossing the Lent's private property. It is worth noting, therefore,

that special condition 5 of the original permit that required the offer to dedicate a vertical easement also required that "Applicant shall also provide an area for stairs down from the vertical accessway, if necessary, to the beach seaward of the structure." Here again, the easement holder would be more than willing to work with your client to design a staircase.

Whether Commission Action is Barred under the Doctrine of Equitable Estoppel

Although we did not discuss whether the Commission is barred by estoppel, you raised the issue before with Coastal staff and in your letter of August 2, 2011. Your argument apparently was that the Coastal Conservancy knew of the stairway blocking the easement, but the staircase was not cited in either the Conservancy's letter or in the Commission's 2007 Notice of Violation ("NOV") and its 2007 Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings and to Record a Notice of Violation of the Coastal Act ("NOI"). In your 2011 letter, for instance, you claim that the Conservancy inspected the easement area in 1993 and sent a letter to the previous owners that the Conservancy's easement was blocked by the gate across the vertical easement, but did not include an allegation for the staircase. And you state that the Commission failed to include the staircase in its 2007 NOV and NOI. Additionally, you argue that the holding of *Feduniak* precluding estoppel from preventing a Commission enforcement action would not apply here because in *Feduniak* the Commission did not know of the violation, and in this case, the Commission knew of the violation (the stairway).[1] Therefore, you claimed in your August 2, 2011 letter that the Commission is likely barred by estoppel or laches because the Coastal "Conservancy did in fact know of the existence of the stairway and the landing nearly ten (10) years before our clients bought the subject property."

The first problem with your estoppel argument is that the ruling of *Feduniak* does indeed apply in this instance to preclude the application of estoppel to the Commission. *Feduniak* is not limited to instances when the Commission lacks knowledge of a violation, but rather applies the well-known four elements test for estoppel to Commission actions. It is beyond the scope of this letter to fully analyze those four elements, but under *Feduniak* several points are relevant here. One, actual knowledge not just of the development but that the development was a permit violation by the Commission is required. Here, the Commission did not have actual knowledge of the full extent to which the unpermitted development on the Lent property intruded onto the vertical access easement until an actual easement survey could be completed, which was March 3, 2008. Two, under *Feduniak* the mere failure to enforce a law does not mean that the Commission can never enforce it. Here, just because the Commission did not initially specify the stairway in its notice of unpermitted development, does not estop it from regulating all unpermitted development on the site. Three, for estoppel to apply under *Feduniak*, Commission actions must show intent to cause the other party to act or refrain from acting in a certain way to its detriment. Here, there is no evidence the Commission intended the Lents to take action to their detriment, nor have they taken action to their detriment; on the contrary, even if the Lents are now required to remove the stairway, they have enjoyed the benefit of the private use of a public accessway to the public's detriment for all of the intervening years. Furthermore, as Feduniak states there is "no authority indicating that the Commission owes a duty of care to future property buyers to regularly monitor property for easement violations so as to prevent

[1] *Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th 1346.

them from buying property that is in violation of applicable restrictions."[2] Four, *Feduniak* asserts that estoppel against the Commission requires an additional finding that estoppel would not "nullify a strong rule of policy adopted for the public's benefit," and that "[u]nquestionably, the Coastal Act reflects "'strong rules of public policy adopted for the public's benefit'" that implicate matters of vital interest."[3] Here, the Coastal Act declares that maximizing public access to the coast is a fundamental goal for the state and the original CDP stated that without a condition for vertical access, the residence would violate the fundamental public policy goals; and the City of Malibu has declared that opening easements to the coast, including the specific easement here, is a fundamental public policy goal.

The second problem with your estoppel argument is the attempt to characterize the notice provided in the Commission's 2007 NOV and NOI as being limited to the narrow issue of the stairway and gate. While both the NOV and NOI describe the unpermitted development as a fence and gate, they both more generally assert that unpermitted development is blocking the easement. The NOV states: "The focus of this letter is the vertical easement . . . ." The NOI states the Commission intends to commence proceedings for "unpermitted development on your property that is inconsistent with the terms and conditions of Coastal Development Permit (CDP) No. 421-78." The NOI also states that the unpermitted development is inconsistent with the terms of an easement and goes on to quote the language of the original easement offer to dedicate: "for the purposes of public access from Pacific Coast Highway to the mean high tide line, including the privilege and right to pass and repass over a five (5) ft. wide strip of land located on the subject property along the eastern edge of the parcel . . . ." The NOI notified the Lents of staff's intent to propose orders that would require the removal of the fence and gate and also to "require you to keep the easements open and free from impediments to pedestrian use at all times in the future." Thus, Commission notice to the Lents concerned the central issue that the easement was blocked and put them on notice that any impediments within the easement area would have to be removed. It would be unreasonable to interpret that notice as being limited to a narrow segment of all the development that was blocking the easement or as allowing the continued presence of additional impediments.

The third problem with your estoppel argument is the attempt to somehow attribute Coastal Conservancy knowledge to the Commission and thereby attempt to date Commission knowledge of the violation to 1993. This is clearly not supported by the facts or law. In general, for the actions of one state agency to constitute imputed knowledge to another state agency, some relationship must exist between the agencies that evidences a mark of privity or identity of interests beyond a shared common enforcement purpose. (*City and County of San Francisco v. Grant* (1985) 181Cal.App.3d 1085.) The Conservancy and Commission are separate agencies, not partners, and do not have an identity of interests. In this case, for instance, there is no management agreement between the Conservancy and the Commission with regard to the easement. The Conservancy was enforcing its own rights as holder of the easement. The Commission was exercising its own rights to regulate development that requires a CDP from the Commission or that occurs in conflict with an existing permit.

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[2] *Id.*, 1363.
[3] *Id.*, 1372, 1376-1377.

Finally, the doctrine of laches does not apply in this case. As an equitable defense, laches "will not ordinarily be invoked to defeat policy adopted for the public protection." (*City of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 646.) Laches also requires both unreasonable delay and prejudice resulting from the delay. (*Mt. San Antonio Comm. Coll. Dist. v. Pub. Emp. Rel. Bd.* (1989) 210 Cal.App.3d 178.) Clearly, the Lents have not been prejudiced and have suffered no harm from the fact that the easement was not accepted and opened for public use at an earlier date. In fact, they have benefitted from the delay in that they have been able to delay opening up the public accessway on their property, and enjoyed private access in the meantime.

Whether Alternative Easements can be Substituted for Compliance

In conversation, and in a publically available letter of March 7, 2013 to the Coastal Conservancy regarding the 2012 Malibu Coastal Access Public Works Plan, you raised the issue of other nearby public easements. In general, the presence of other accessways in other locations along the coast is not a legal justification for eliminating accessways. Indeed, the Malibu LCP mandates opening all existing public accessways. Section 12.9E of the implementation plan portion of the LCP states: "Improvements and/or opening of accessways already in public ownership or that are accepted pursuant to an offer to dedicate required by a Coastal Development Permit shall be permitted regardless of the distance from the nearest available vertical accessway." Moreover, giving up one access easement for other preexisting ones goes against Coastal Act requirements to maximize public access. Section 30001.5(c) of the Act declares a public policy goal to "Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone . . . ." The Malibu LUP and the Coastal Act Section 30212.5 also adopt the policy goal of accepting as many public access sites as possible "so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area." Even if other easements opened, the vertical accessway at 20802 PCH will help to alleviate parking congestion and overcrowding by the public at one single area.

It should be noted that very similar arguments were made in another recent vertical access easement enforcement action only a few miles up the coast from the Lent property. There a property owner also argued that, because of the presence of nearby existing accessways (both developed and undeveloped), the Commission should not take enforcement action to require the opening of the property's owner's easement. That property owner even pointed to Commission findings in connection with the original permit about the possibility of revoking the permittee's offer if other accessways were later opened. That property owner also argued that their site was less suited for development. Despite all of that, in the Findings in Support of the Commission's July 8, 2009 Issuance of Cease and Desist Order CCC-09-CD-01, the Commission rejected those arguments for many of the same reasons that apply here, including that the Coastal Act and the Malibu LUP and LCP require all existing public easements for vertical accessways to be opened.[4] The Commission's action, and these Commission findings, were challenged and upheld by both the trial court and the Court of Appeal (and the Supreme Court denied review).[5]

[4] An additional factor common to both cases is that the time for revocation of the offer had long since passed, as the offer had been accepted, and the easement was in effect.
[5] *Ackerberg v. California Coastal Commission* (Aug. 27, 2012, B235351) [nonpub. opn.].

Moreover, none of the access easements you have mentioned—21202 PCH (a vacant parcel east of Duke's Restaurant), 20340 PCH (east of Moonshadows Restaurant), and 19900 PCH (which is just a view overlook)—are currently opened for public beach access. The 19900 PCH easement is managed by Caltrans with no existing or planned vertical beach access. 20340 PCH is a closed accessway managed by LA County Beaches and Harbors, who have no current plans to redevelop the accessway. 21202 PCH does contain a vertical easement accepted by the Conservancy, but construction of this public access awaits uncertain future development and cannot be considered existing access. Therefore, while the Malibu LUP Section 2.86 (p) includes the specific standard of one accessway for every 1000 feet for Las Costa and Las Flores beaches, the nearest access here is much further and located at different beaches: 1.7 miles (8976 feet) to the west at 22126 Pacific Coast Highway (Carbon Beach) or 1 mile (5280 feet) to the east at 20000 Pacific Coast Highway (Big Rock Beach). In short, public access in this area is extremely limited, especially in the area of Las Flores Beach, with no public access to meet great demand.

Proposed Resolution

I hope this letter clarifies these issues and the Commission's position on them for you.

In summary, the residence at 20802 Pacific Coast Highway was only able to comply with the requirements of the Coastal Act by virtue of the establishment of a vertical access easement for the public. The original CDP was specifically conditioned on such public access. The construction of a stairway, fence and other development in the easement area was not approved by the Commission and constitutes unpermitted development and development inconsistent with a CDP. Removal of this development is required to open the vertical easement to make Las Flores beach and its existing lateral easements available for the public's use.

We continue to look forward to working with you to reach an amicable settlement of the unpermitted development and blocked public access easement. We hope to bring forth a negotiated Consent Order to a Commission hearing this spring or summer in southern California. I anticipate hearing from you by February 14, 2014.

Sincerely,

Peter Allen
Statewide Enforcement Analyst

cc: Lisa Haage, Chief of Enforcement
Aaron McLendon, Statewide Enforcement Supervisor
Alex Helperin, Enforcement Staff Counsel